

Mailed:
June 21, 2005

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Global Mentoring Solutions, Inc.

Serial No. 76487218

Sherry H. Flax of Saul Ewing LLP for Global Mentoring Solutions, Inc.

Brendan D. McCauley, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Hairston, Walters and Walsh, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

On February 4, 2003, Global Mentoring Solutions, Inc. (applicant) filed an intent-to-use application to register REAL TIME LEARNING in standard characters on the Principal Register for "training services in the field of computer applications and technical training for businesses via the Internet" in International Class 41.¹

¹ Serial No. 76487218

The examining attorney refused registration on the ground that the mark merely described the services under Section 2(e)(1) of the Trademark Act. 15 U.S.C. § 1051(e)(1). Applicant responded; the examining attorney made the refusal final and applicant appealed.

For the reasons set forth more fully below, we affirm. Briefly, the examining attorney has presented substantial evidence of the use and understanding of the term REAL TIME LEARNING in relation to training services rendered over the Internet to describe a significant characteristic or feature of those services, that is, the ability of participants to interact during the training.

Section 2(e)(1) of the Trademark Act prohibits registration of a mark that is "merely descriptive" of the goods or services identified in the application. To determine whether a mark is merely descriptive, we must consider the significance of the mark in connection with the goods or services identified in the application, not in the abstract. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); TMEP § 1209.01(b). A term is merely descriptive if it immediately describes a characteristic or feature of the goods or services. In re Guylay, 820 F.2d 1216, 3 USPQ2d 1009, 1009-1010 (Fed. Cir. 1987); TMEP § 1209.01(b). Words may be combined to form

phrases or terms which take on a well understood descriptive meaning to the relevant public for specific products or services. In re Copytele Inc., 31 USPQ2d 1540, 1542 (TTAB 1994); In re Digital Research Inc., 4 USPQ2d 1242, 1244 (TTAB 1987); TMEP § 1209.03(d).

In this application, the examining attorney has presented substantial evidence that REAL TIME LEARNING is used and readily understood by the relevant public, those who use Internet-based training services, to identify a training or educational service rendered via the Internet which permits participants to interact with one another during the training. The evidence shows that Internet-based training services which incorporate this capability are also described as "synchronous" and distinguished from services which do not possess such a feature, that is, "asynchronous" or self-paced training services.

The examining attorney's evidence, derived from electronic searches, consists of several articles in full text, short excerpts from a U.S. newspaper data base search, listings of results from Google® searches, a definition from an online "Glossary of e-Learning Terms," and definitions of "real time" and "learning" from general dictionaries.

The full-text articles clearly demonstrate the significance of REAL TIME LEARNING in relation to on-line training services. For example, an article entitled "Have e-Learning Will Travel" from www.purpletrain.com attached to the examining attorney's response to applicant's request for reconsideration states, "For those learners who enjoy interacting, synchronous or **real time learning** allows for simultaneous learner access to content, instructors and other learners LIVE. Learners meet 'virtually' at a specific time without leaving their home or workplace and often communicate across Different Time Zones." Another article entitled "What is Virtual Training?" attached to that action from www.pcfocus.com states, "Self-paced training on the Internet has been available for a few years but only in recent months LIVE learning over the Internet has become not only available but affordable. PC Focus wants to introduce the virtual classroom to you and your organization. It's live, hands-on, '**real time' learning**." Another article attached to that action entitled "e-lessons learned" from www.camagazine.com states, "Today these firms are using satellite broadcasts and webcast for synchronous **(real-time) learning**, and computer-based training as well as training-based CDROMS for asynchronous learning." Yet another article entitled "**Real-Time Learning** Labs" attached

to the action from www.ecollege.com states, "eCollege is pleased to offer quick and easy training opportunities for faculty and administrators - **Real-Time Learning** Labs.

Real-Time Learning Labs are 90 minute synchronous workshops on specific areas of the eCollege AU+ system. . . . Each session is live and led by a member of the eCollege Instructional Design team." Another article entitled "Business-Based Learning: Strategies for **Real-Time Learning**" attached to that action from www.clomedia.com states, "Part Three developed solutions for virtual collaborative communities to leverage those "a-ha" **real-time learning** moments . . ." Finally, another article entitled "Classroom Training in Real Time" attached to that action from www.informationweek.com states: "The company hopes LearnLinc will strike the right balance of individual study and live-if remote-tutoring. Demand for **real-time learning** software is likely to pick up as more innovative products come to market . . ."

The U.S. Newspaper data-base evidence attached to his response to the request for reconsideration consists of numerous short excerpts. These excerpts confirm the significance of REAL TIME LEARNING demonstrated in the full-text articles. For example, Result 19 from the New York Beacon states, "Disadvantaged Students Find Success on

the Net . . . over the Internet offer **real time learning** and interaction with professors and other . . . " Result 28 from the Fresno Bee states, "Distance barrier to learning falls; Technology links distant students to course offerings at Fresno State . . . All of this means **real time learning** for Blades and others. . ."

The examining attorney attaches to his final refusal entries from an online "Glossary of e-Learning Terms" from www.learnframe.com, including the following:

asynchronous learning - A self-paced learning event. Learners are online at different times and cannot communicate without time delay. Examples: courses taken via Internet, CD-ROM, Web presentation, or videotaped classes.

synchronous learning - **Real time learning** situation that can include immediate, two-way communication between participants.

These entries provide further confirmation of the descriptive significance of REAL TIME LEARNING in the field of Internet-based training and demonstrate that "synchronous learning" and "real time learning" can be used interchangeably.

The examining attorney also attaches listings of results from a Google® search to his response to the request for reconsideration. This evidence also confirms the descriptive significance of REAL TIME LEARNING established through the other evidence.

In addition, the examining attorney, with his first action refusal and in later actions, includes definitions of the individual terms "real time" and "learn" or "learning." These definitions are, of course, more general, but they too support the examining attorney's position. The evidence discussed above demonstrating that the full phrase "real time learning" has become a term of art in the field of Internet-based training supercedes these definitions in importance for purposes of determining whether REAL TIME LEARNING is merely descriptive under § 2(e)(1) for Internet-based training services. In re Shiva Corp., 48 USPQ2d 1957, 1958 (TTAB 1998).

The only evidence applicant submitted in support of its position are records of third-party registrations discussed below. Applicant has not provided any evidence which in any way contradicts or counters the evidence presented by the examining attorney. In its appeal brief applicant simply states, "The Examining Attorney has provided no evidence that a consumer who encounters the mark REAL TIME LEARNING will immediately understand that Applicant's services are 'training services in the field of computer applications and technical training services for businesses via the Internet.'" Applicant does not

otherwise address the evidence presented by the Examining Attorney in its responses or its brief.

In an apparent attempt to overcome the refusal the only evidence applicant has offered is a group of third-party registrations which include either "real time" or "learning" in the marks, noting that the terms are not disclaimed in the records. Relying on these records, applicant argues that the PTO does not consider "learning" to be merely descriptive of educational or training services. Id. at 3. Applicant argues further on the basis of these records that, "the PTO does not consider use of the terms REAL TIME in combination with another descriptive term as merely descriptive of a function or feature of the relevant goods or services." Id. at 4.

With regard to the third-party registrations in general, the absence of disclaimers of specific terms in the marks in those records is of little or no relevance for the purpose of determining the significance of REAL TIME LEARNING in relation to the services applicant identifies here. The marks and the goods and services in each of the registrations differ from the mark and the services at issue here. Prior registrations cannot control our determination in this application. In re Nett Designs, Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We must consider each application on its own merits based on the record in that application and current circumstances. In re Sun Microsystems Inc., 59 USPQ2d 1084, 1088 (TTAB 2001).

Furthermore, examining attorneys have wide discretion in requiring disclaimers. TMEP § 1213.01(a). In many instances PTO policy directs examining attorneys not to require a disclaimer of a particular descriptive term, such as, when the descriptive term is part of a unitary mark. See, e.g., TMEP § 1213.05. Therefore, the presence or absence of a disclaimer in a particular registration does not necessarily indicate whether or not the PTO considered a term merely descriptive, even at the time the application was examined.

Furthermore, many of the registrations submitted by applicant, in fact, include disclaimers of "real time." See, e.g., Reg. Nos. 2,062,112 for REALTIME NOTES ("REALTIME" disclaimed); 2,258,519 for REAL-TIME INNOVATIONS ("REAL-TIME" disclaimed); 2,187,475 for REAL TIME REMOTE ("REAL TIME" disclaimed); and 2,507,504 for REAL-TIME STUDIO ("REAL-TIME" disclaimed).² Most importantly, applicant's arguments based on third-party

registrations are unpersuasive in view of the substantial evidence provided by the examining attorney that the entire phrase REAL TIME LEARNING now has taken on a specific descriptive meaning in relation to the services Applicant identified in the application - evidence applicant has not addressed. In re Shiva Corp., 48 USPQ2d 1957, 1958 (TTAB 1998).

Lastly, we must reject the applicant's general argument that consumers will not understand what applicant's services are based on the mark. This argument disregards the fundamental requirement that we must consider the significance of the mark in relation to the goods or services identified in the application, not in the abstract. As the Board has observed previously, "Whether consumers could guess what the product is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985). TMEP § 1209.01(b).

Although the applicant had ample opportunity to do so in its two responses to office actions and two briefs, the applicant has not offered any explanation or argument as to the characteristics of the services it intends to offer

² Furthermore, applicant has not indicated whether there may be other registrations, which include disclaimers of either term,

under the REAL TIME LEARNING mark, most importantly whether or not the services will permit participants to communicate during the training. Furthermore, applicant has not represented that the services would not include a feature whereby participants could communicate with one another during the training.

The examining attorney has argued that applicant has "conceded" that "real time" is merely descriptive because applicant proffered a disclaimer of "real time" in its response to the examining attorney's first action. Examining Attorney's Appeal Brief at 4. In its request for reconsideration applicant withdrew the disclaimer indicating it mistakenly believed that the disclaimer had been required. Applicant's Request for Reconsideration at 4. In view of the evidence of record, we need not consider whether applicant conceded that "real time" is merely descriptive and have not relied on such an admission in reaching our decision.

Accordingly, we conclude that REAL TIME LEARNING is merely descriptive of "training services in the field of computer applications and technical training for businesses via the Internet" in view of the substantial evidence that the relevant public uses and readily understands REAL TIME

which it did not provide for the record.

Ser No. 76487218

LEARNING to describe a significant characteristic or feature of those services, that is, the ability of participants to communicate during the training.

Decision: The refusal to register applicant's mark on the ground that it is merely descriptive of the services is affirmed.